149 U.S. 605

RECORD, CASE No. 13,908.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~617~~. 279

MOSES EVANS, PLAINTIFF IN ERROR,

vs.

ANNA STETTNISCH, AUGUSTA STETTNISCH, AND ARNOLD VOGT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED NOVEMBER 1, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1892.

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska, at the May adjourned term, A. D. 1887.

Be it remembered that on the 10th day of November, 1884, amended and reformed petition was filed in the office of the clerk of said circuit court; which said amended and reformed petition is in words and figures following, to wit:

Reformed Petition.

In the Circuit Court of the United States, District of Nebraska.

MOSES EVANS, SR.,
vs.
ANNA STETTNISCH, AUGUSTA STETTNISCH, & ARNOLD VOGT, Defendants.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

Comes now the plaintiff, Moses Evans, who is a citizen of the State of Missouri, and brings his petition against the defendants, Anna Stettnisch, Augusta Stettnisch, and Arnold Vogt, who are residents and citizens of the Empire of Germany; and thereupon your petitioner complains and says that the plaintiff and defendants above named are residents and citizens of the several places hereinbefore mentioned, and that the said defendants, Anna Stettnish, has been continuously such citizen and resident of said Empire of Germany since the 24th day of July, A. D. 1871, and that the matter
2 in controversy in this suit exceeds the sum or value of five thousand dollars, exclusive of costs.

And, further, for a first cause of action, your petitioner avers that heretofore, to wit, on the 24th day of July, A. D. 1871, said defendant, Anna Stettnisch, for a valuable consideration, made, executed, and delivered unto one Louisa C. Reinbold her certain promissory note in writing, of the date last aforesaid, whereby she undertook and promised to pay unto said Louisa C. Reinbold or order certain sums of money as stated in the following copy of said note; and said promissory note is in the words and figures following, to wit:

"$2,000.00. NEBRASKA CITY, *July 24th*, 1871.

"Two years after date I promise to pay to Lucy C. Reinbold or order two thousand dollars, at the Otoe County National bank, in Nebraska City, with interest at the rate of 10 *% per cent.* per annum, value received.

"ANNA STETTNISCH,
"By CHAS. VOGT (*Agent*).

"No. —. Due July 24-27, 1873."

Further, your petitioner represents and shows unto your honors that on or about the 1st day of August, A. D. 1873, the said Lucy C. Reinbold, for a good and valid consideration to her in hand paid by one S. H. Calhoun, *she* sold, transferred, assigned, and delivered said note unto the said S. H. Calhoun, and said Calhoun afterwards, for a valid consideration to him paid, duly sold, transferred, and delivered said note unto the plaintiff, Moses Evans, who is now the legal owner and holder of said note. No part of said note has been paid, and there is due and payable on said note on the 24th day of July, A. D. 1884, the sum of $146.00.

And for a further and second cause of action your petitioner avers and shows unto this court that heretofore, to wit, on the
3 24th day of July, A. D. 1871, said Anna Stettnisch, for a valuable consideration, made, executed, and delivered unto one Lucy C. Reinbold her certain promissory note in writing, of the date last aforesaid, whereby she undertook and promised to pay unto said Louisa C. Reinbold or order certain sums of money as stated in the following copy of said note; and said promissory note is in the words and figures following, to wit:

"$3,000.00. NEBRASKA CITY, *July 24th*, 1871.

"Two years after date I promise to pay to Louisa C. Reinbold or order three thousand dollars, at the Otoe County National bank, in Nebraska City, with interest at the rate of 10 *% per cent.* per annum, value received.

"ANNA STETTNISCH,
"By CHAS. VOGT (*Agent*).

"No. —. Due July 24–27, 1874."

Further, your petitioner represents and shows unto your honors that on or about the 1st day of August, 1873, the said Louisa C. Reinbold, for a full and valid consideration to her in hand paid by one S. H. Calhoun, *she* sold, transferred, assigned, and delivered said note unto the said Calhoun, and said Calhoun afterwards, for a valuable consideration to him paid, duly sold, transferred, and delivered said note unto the plaintiff, Moses Evans, who is now the legal owner and holder of said note. No part of said note has been paid, and there is due and payable on said note and indebtedness the sum of $6,900.00, with interest at 10 % from the 24th day of July, A. D. 1884.

And for a further and third cause of action your petitioner shows unto your honors that heretofore, to wit, on the 24th day of July, A. D. 1871, said defendant, Anna Stettnisch, for a valuable consideration, made, executed, and delivered unto one Louisa C.
4 Reinbold her certain promissory note in writing, of the date last aforesaid, whereby she undertook and promised to pay unto said Louisa C. Reinbold or order certain sums of money, as stated in the following copy of said note; and said promissory note is in the words and figures as follows, to wit:

"$1,800.00. NEBRASKA CITY, *July* 24, *A. D.* 1871.

"Five years after date I promise to pay to Louisa C. Reinbold or

order eighteen hundred dollars, at the Otoe County National bank, with interest at the rate of 10 % *per cent.* per annum, value received.

"A. STETTNISCH,
"By CHAS. VOGT (*Agent*).

"No. —. Due July 24–27, 1876."

Further, your petitioner represents and shows unto your honors that on or about the 1st day of August, A. D. 1873, the said Louisa C. Reinbold, for a full and valid consideration to her in hand paid by one S. H. Calhoun, *she* sold, transferred, assigned, and delivered said note unto the said S. H. Calhoun, and that said S. H. Calhoun afterwards, for a valuable consideration to him paid, duly sold, transferred, and delivered said note unto the plaintiff, Moses Evans, who is now the legal owner and holder of said note. No part of said note has been paid, and there is now due and payable on said note and indebtedness the sum of $4,140.00, with 10 % interest from the 24th day of July, 1884.

There is due and payable upon the three several notes the sum of $15,640.00, with interest from the 24th day of July, A. D. 1881. Wherefore your petitioner, the plaintiff herein, prays judgment against the said defendant, Anna Stettnisch, in the sum of $15,640.00 and interest, and for costs.

5 STATE OF NEBRASKA, } ss:
Lancaster County, }

John S. Gregory, being by me duly sworn, on his oath says that he is the duly authorized attorney of the plaintiff, Moses Evans; that said Evans is absent from the State of Nebraska, and that the facts stated in the foregoing petition are true, as he verily believes.

JOHN. S. GREGORY.

Subscribed in my presence and sworn to before me this 8th day of November, A. D. 1884.

[SEAL.] GEO. SCHAEFER,
Notary Public.

Upon the back of said amended and reformed petition appear endorsements in words and figures following, to wit: No. 379, H. Moses Evans *vs.* Anna Stettnisch *et al.* Amended reformed petition. Filed Nov. 10, 1884. Elmer D. Frank, clerk. J. S. Gregory, pl'ff's att'y.

Thereupon, afterwards, at the May term of said court, on the 2nd day of May, 1887, the following proceedings were had and done in said cause, as appears of record on folio 25, Journal "M" of said court, to wit:

MOSES EVANS
vs. } 379, H.
ANNA STETTNISCH.

Ordered continued.

Thereupon, afterwards, to wit, at the May term of said court, on the 18th day of August, 1887, the following preceedings were had and done in said cause, as appears of record on folio 345, Journal "M" of said court, to wit:

MOSES EVANS
vs.
ANNA STETTNISCH *et al.* } 379, H.

6 On motion of defendant-, leave is granted by the court to answer herein in ten days. Plaintiff is ruled to reply in twenty days, and it is ordered by the court that the continuance heretofore entered herein be, and the same is hereby, set aside and this cause stand for trial at the adjourned term of this court.

Thereupon, afterwards, to wit, on the 20th day of August, 1887, amended answer was filed in said case; which said amended answer is in words and figures following, to wit:

Amended Answer to Amended Reformed Petition.

In the United States Circuit Court, District of Nebraska.

MOSES EVANS
vs.
ANNA STETTNISCH. } Amended Answer.

Now comes the defendant, Anna Stettnisch, and for amended answer to the amended reformed petition filed herein, says: The said defen- denies that she ever made any or either of the notes set forth in the said petition, or that Louisa C. Reinbolt, the payee thereof, ever sold, assigned, transferred, or delivered the same to S. H. Calhoun, or that said Calhoun, for a valid or any consideration, ever sold, transferred, or delivered the same to the plaintiff, or that the said plaintiff is the legal pwner or holder thereof; and she says that she never received any consideration for the said notes or any or either of them.

Second defense. For a further and second defense to the said petition the said defendant says, by way of plea in abatement, that John S. Gregory, a citizen of this State, obtained possession of the said notes by the payment therefor to the said S. H. Calhoun of one hundred dollars and no more, and that the said plaintiff has
7 no interest therein, except for the purpose of assisting the *the* said Gregory in the fraudulent attempt to collect and enforce said notes.

J. M. WOOLWORTH,
Attorney for Defendant.

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says he is the attorney for the above-named defendant, who is a non-resident of and now absent from this district; that the facts set forth in the foregoing amended answer *is* true, as affiant verily believes.

J. M. WOOLWORTH.

Subscribed in my presence and sworn to before me this 20th day of August, 1887.

[SEAL.] JAMES P. ENGLISH,
Notary Public.

Upon the back of said amended answer appear endorsements in words and figures following, to wit: No. 379, H. United States circuit c't. Moses Evans *vs.* Anna Stettnisch. Amended answer to amended reformed petition. Filed Aug. 20, 1887. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 22nd day of September, 1887, reply was filed in said case; which said reply is in words and figures following, to wit:

In the Circuit Court of the United States within and for the District of Nebraska.

MOSES EVANS, Plaintiff,
vs.
ANNA STETTNISCH, Defendant. } Reply.

Comes now the plaintiff, Moses Evans, and, for reply to the amended answer filed herein, says that he denies each and every allegation of new matter in said answer contained.

JOHN S. GREGORY & L. C. BURR,
Attorneys for Plaintiff.

8 STATE OF NEBRASKA, } *ss:*
Lancaster County, }

John S. Gregory, being first duly sworn, upon his oath says that he is the duly authorized attorney of the plaintiff, Moses Evans; that said plaintiff is a non-resident and is now absent from the State of Nebraska, and that the facts stated in the foregoing reply are true, as he verily believes.

JOHN S. GREGORY.

Subscribed in my presence and sworn to before me this 21st day of September, A. D. 1887.

[SEAL.] W. B. BAIRD,
Notary Public.

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 379, H. In the U. S. circuit court, district of Nebraska. Moses Evans *vs.* Anna Stettnisch *et al.* Reply. Filed Sep. 22, 1887. Elmer D. Frank, clerk. J. S. Gregory & L. C. Burr, attorneys for plaintiff.

Thereupon, afterwards, to wit, at the November term of said court, on the 4th day of November, 1887, the following proceedings were had and done in said cause, as appears of record on folio 412, Journal "M" of said court, to wit:

MOSES EVANS
vs.
ANNA STETTNISCH *et al.* } Trial. No. 379, H.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit: 1, Robert Mason; 2, T. D. Black; 3, I. N. Lyon; 4, H. C. Karns; 5, John McArdle; 6, Henry Bacon; 7, Thos. McNeil; 8, John Peterson; 9, Michael Meaney; 10, A. Ballman; 11, Charles E. Reynolds; 12, John F. Price, who were duly empaneled and sworn according to law; and thereupon, after hearing the evidence, argument, and charge of the court, the
9 jury retire to their room in charge of a bailiff, duly sworn, for deliberation.

And now comes said jury into open court and present to the court their verdict, which is in words and figures following, to wit:

"MOSES EVANS
vs.
ANNA STETTNISCH. }

We, the jury duly empanelled in the above-entitled action, do hereby find for the defendant.

(S'g'd) T. D. BLACK, *Foreman.*"

MOSES EVANS
vs.
ANNA STETTNISCH *et al.* } Judgment on Verdict.

The jury in this action having on this day rendered a verdict for the defendants and against the plaintiff for his costs in this action, on motion of said defendants, by J. M. Woolworth, their attorney, it is considered, ordered, and adjudged by the court that the defendants are entitled to judgment on said verdict, and that said defendants, Anna Stettnisch *et al.*, have and recover of and from said plaintiff, Moses Evans, the sum of $—, costs herein expended, and that execution issue therefor.

Thereupon, afterwards, to wit, at the November term of said court, on the 12th day of November, 1887, the following proceeding- were had and done, as appears of record on folio 444, Journal "M" of said court, to wit:

MOSES EVANS
vs.
ANNA STETTNISCH *et al.* } 379, H.

On motion of the plaintiff, by J. S. Gregory, his attorney,
10 leave is hereby granted by the court to file a motion for new trial herein.

Thereupon, afterwards, to wit, on the 12th day of November, 1887, motion and affidavit was filed in said case; which said motion and affidavit *is* in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

MOSES EVANS, Plaintiff,
vs.
ANNA STETTNISCH *et al.*, Def't. } Motion.

Comes now the plaintiff, by John S. Gregory, his attorney, and moves the court that the findings and judgment in said cause, obtained by the defendant on the 4th day of November, 1887, may be vacated, and that plaintiff may be awarded a new trial for the reasons that at the call of the docket on the first day of this term, to wit, May 2d, 1887, this cause was, upon solicitation of the plaintiff's counsel, by order of the court, continued to the November, 1887, term of said court, and that said order of continuance was afterwards caused to be vacated by defendants' counsel during the absence of the plaintiff's counsel and without notice, and for the reason that said plaintiff had no notice or information that said cause stood for trial at this term, and has been thus prevented from presenting his evidence to the jury and has not had a fair trial in said cause.

This motion is supported by the records in the cause and by affidavit hereto attached.

JOHN S. GREGORY,
Attorney for Plaintiff.

Affidavit.

In the Circuit Court of the United States, District of Nebraska.

11 MOSES EVANS
vs.
ANNA STETTNISCH. } Affidavit. 379, H.

John S. Gregory, being first duly sworn, deposes and says that he is the duly authorized attorney of the plaintiff in this action, and that on the first day of the present term, to wit, May 2nd, 1887, the said plaintiff was present in court, by his solicitor, at the call of the docket for said May term, 1887, of the court, and upon the call of said cause plaintiff's counsel requested that said cause should be set for trial at said term in its regular order. Counsel for said defendant was also present, and prayed the court for a continuance to the November, 1887, term ; which prayer was by the court then granted, and an order of continuance was duly entered upon the court records by the clerk.

On the 19th day of August, 1887, being a day of said May term, the defendants' counsel procured an order of the court vacating said order of continuance.

Said order was so obtained during the absence of plaintiff's counsel and without notice to plaintiff or to affiant that application would be made to the court for the vacation of said order of continuance, and no notice or information whatever was served upon or communicated to said plaintiff that said cause stood for trial at this term until on the 11th day of November, 1887, and after judgment had been entered therein.

Affiant further says that the issues upon which this cause rests were joined during the present term by the filing of defendants' amended answer therein on the 20th day of August, 1887, and the filing of plaintiff's reply thereto on the 22nd day of September, 1887.

And further affiant says not.

JOHN S. GREGORY.

12 STATE OF NEBRASKA, } ss:
Douglas County }

John S. Gregory, being duly sworn, says the foregoing statement of facts by him subscribed *are* true.

JOHN S. GREGORY.

Signed and sworn to before me this 12th day of November, 1887.

E. D. FRANK, *Clerk.*

In the Circuit Court of the United States, District of Nebraska.

MOSES EVANS }
vs.
ANNA STETTNISCH. }

Plaintiff prays permission of the court to file a motion for vacation of the judgment in said cause and for new trial.

JOHN S. GREGORY,
Sol. for Pl'ff.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 379, docket H. Moses Evans *vs.* Anna Stettnisch. Motion and affidavit. Filed Nov. 12, 1887. Elmer D. Frank, clerk. John S. Gregory, sol. for pl'ff.

Thereupon, afterwards, to wit, at the January term of said court, on the 9th day of January, 1888, the following proceedings were had and done in said cause, as appears of record on folio 592, Journal "M" of said court, to wit:

MOSES EVANS }
vs. } 379, M.
ANNA STETTNISCH *et al.* }

This cause having been heard on the motion of plaintiff to
13 set aside the judgment and verdict and for a new trial herein, and the court, after careful consideration thereof, doth now, on this day, order and adjudge that said motion be, and the same is hereby, overruled, and that the judgment heretofore entered herein be and remain absolute.

Thereupon, afterwards, to wit, on the 19th day of October, 1889, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals thereof:

14 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Moses Evans, plaintiff, and Anna Stettnisch, Augusta Stettnisch, and Arnold Vogt, defendant-, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 19th day of October 1889.

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Seal United States Circuit Court, District of Nebraska.]

[Endorsed:] No. 379, H. United States circuit court, district of Nebraska. Moses Evans *vs.* Anna Stettnisch *et al.* Writ of error. Filed Oct. 19, 1889. Elmer D. Frank, clerk.

15 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Anna Stettnish, Augusta Stettnish, and Arnold Vogt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Moses Evans is plaintiff in error *plaintiff in error* and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, at Omaha, this 19th day of October, 1889.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

15½ [Endorsed:] No. 379, H. United States circuit court, district of Nebraska. Moses Evans, pl'ff in error, *vs.* Anna Stettenisch *et al.*, def'ts in error. Citation. Filed Oct. 26, 1889. Elmer D. Frank, clerk. Service admitted Oct. 26, 1889. J. M. Woolworth, att'y for Anna Stettnech.

16 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios, from 1 to 13, contain true and faithful transcripts from the records and files of said court in the case of Moses Evans *vs.* Anna Stettnisch *et al.*, and that *a* copies of the writ of error and citation have been lodged and remain in my office.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 26th day of October, A. D. 1889.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

17 *Assignment of Error.*

In the Supreme Court of the United States.

MOSES EVANS, Plaintiff in Error,
vs.
ANNA STETTNISCH, ANGUSTA STETTNISCH, and ARNOLD VOGHT, Defendants in Error.

Comes now Moses Evans, plaintiff in error in the above-entitled action, and represents to this honorable court that in an action heretofore pending and determined in the circuit court of the United States for the district of Nebraska, wherein Moses Evans was plaintiff and Anna Stetnisch, Augustas Stetnisch, and Arnold Voght were defendants, manifest errors happened and were done, to the great damage of the plaintiffs in error, of which errors are assigned as follows:

First.

On the 2nd day of May, 1887, being the first day of the May term of said court, upon motion of defendants' attorney, an order of the court was duly entered continuing said cause of action to the next succeeding term of the court, and on the 18th day of August, 1887, being a day of the May, 1887, term of said court, the said court did, upon application of the said defendants' attorneys and without any notice to the said plaintiff or his attorney, set aside said order of

continuance, and did also, on the 4th day of November, 1887,
18 being a day of the May term of said court, during the absence of plaintiff and his attorney and without notice to said plaintiff or his attorney, proceed to the trial of said action, and did, without any evidence being adduced in support of plaintiff's cause of action, proceeded to render judgment against said plaintiff and in favor of defendant therein;

Whereas the said court should have required notice to have been given to the plaintiff or his attorney of the order setting aside said order of continuance before permitting the cause to be called for trial at said May term of court.

Second.

The court erred in permitting the defendant to proceed to trial without notice to and during the absence of plaintiff and his counsel at the same term of the court at which issues had been joined in the cause.

Third.

That afterward, and at the next succeeding term of said court, circuit, the said court overruled plaintiff's motion for a new trial in said action; whereas said court should have sustained said motion and allowed the plaintiff a new trial, as in said motion prayed.

Wherefore the plaintiffs in error prays this honorable court to correct said errors and reverse the judgment rendered as aforesaid by the said circuit court and order that new trial of said cause may be had in said circuit court of the United States for the district of Nebraska, and that an order may be entered against defendants for costs.

CHAS. E. MAGOON,
Attorney for Plaintiff in Error.

[Endorsed:] Moses Evans *vs.* Anna Stettnisch *et al.* Assignments of error. —— ——, solicitor for pl'ff.

Endorsed on cover: Case No. 13,908. Nebraska C. C. U. S. No. 617. Moses Evans, plaintiff in error, *vs.* Anna Stettnisch, Augusta Stettnisch, and Arnold Vogt. Filed November 1, 1889.

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Office Supreme Court U. S.
FILED.
OCT 5 1892
JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1891.

CASE NO. 13,908.

In Error to the Circuit Court of the United States, for the District Court of Nebraska.

MOSES EVANS,
Plaintiff in Error.
ANNA STETTNISCH, et al,
Defendants in Error.

Brief of Plaintiff in Error.

J. S. GREGORY,
Attorney for Plaintiff in Error,

J. M. WOOLWORTH,
Attorney for Defendants in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1891.

CASE NO. 13,908.

In Error to the Circuit Court of the United States, for the District Court of Nebraska.

MOSES EVANS,
Plaintiff in Error.
ANNA STETTNISCH, et al,
Defendants in Error.

Brief of Plaintiff in Error.

J. S. GREGORY,
Attorney for Plaintiff in Error,

J. M. WOOLWORTH,
Attorney for Defendants in Error.

This action was brought in the court below on November 10th, 1884, to recover $15,640 upon unpaid notes of hand. Defendants had appeared by attorney and cause stood for trial at the May term, 1887, of said court.

On the 2d day of May, 1887, being the first day of the May, 1887, term of said court, plaintiff appeared by his attorney and requested that said cause be set for trial. Defendants attorney also appeared and prayed for a continuance to the November, 1887, term; and thereupon an order was entered by the court, that said cause should be so continued to the said November term.

On the 18th day of August, 1887, being a day of the May, 1887, term of said court, on motion of defendants attorney, leave was granted the defendants to answer, and the order of continuance entered at the first day of the term was set aside.

And on the 4th day of November, 1887, being the last day of the May, 1887 term, the cause was called for trial, upon request of defendants attorney, and the same was submitted to the jury, in the absence of plaintiff and his attorney—no trial in fact being had—whereupon judgment was entered for the defendants.

The court will note, that in the printed record before this court, it is stated that the foregoing *trial*. was at the *November* term, to-wit: on the *4th day of November* (*See Record, last paragraph, p. 5.*)

The November, 1887, term of the court, *commenced* on the first Monday of said month, which was November 6th. Therefore the clerk made a mistake in certifying that trial was had at the November term.

The clerk is also mistaken in the trial entry (*page 6, record*) which recites "*Now come the parties herein,*